

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

MV TRANSPORTATION, INC.
and

LANITA BURGOS, an Individual

Case 28-CA-145067

MV TRANSPORTATION, INC'S POST-HEARING BRIEF

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JURISDICTIONAL STATUS

MV Transportation, Inc. (“MV Transportation” or the “Company”) is a corporation engaged in providing transportation services. MV Transportation is headquartered in Dallas, Texas. The Company acknowledges that it meets the Board’s jurisdictional standards as an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the National Labor Relations Act (“the Act”).

SUMMARY OF THE ALLEGED UNFAIR LABOR PRACTICES¹

The Complaint and Notice of Hearing (“Complaint”) alleges that that the Company disciplined and discharged the Charging Party, Lanita Burgos (“Burgos”) because she engaged in protected concerted activities and because of her union activities. The Complaint also alleges that the Company retaliated against Burgos in order to restrain and coerce employees in the exercise their Section 7 rights and to discourage membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act.

As demonstrated below, the allegations in the Complaint are without merit. The overwhelming evidence demonstrates that the General Counsel has failed to satisfy his *prima facie* burden in this case. At a minimum, the uncontroverted facts show that the General Counsel failed to prove that MV Transportation harbored any unlawful animus towards the alleged protected activities engaged in by Burgos. Burgos herself testified that the Company did not take any adverse action against her as a result of her alleged protected activity. The General Counsel also failed to show that the Company took any unlawful action against Burgos because of her union status or activities. In fact, the uncontroverted facts show that MV Transportation and the Union have a well-established bargaining history and enjoy a good working relationship.

Moreover, the uncontroverted evidence shows that Company had legitimate and non-pretextual reasons for the actions it took with respect to Burgos’ employment. Specifically, the

¹ The record consists of the Reporter’s Transcript of Proceedings [“Tr.”], Respondent Exhibits [“R. Ex.”] and General Counsel Exhibits [“G.C. Ex.”].

Company discharged Burgos after she refused a direct order to meeting with the Company's Safety Manager on December 30, 2014. The undisputed facts show that when Burgos was instructed to meet with the Company's Safety Manager she stated "Yes, could you please let Victoria know she needs to contact the NAACP to have an appointment with me" and then left work for the day. [G.C. Ex. 30.] Insubordination constitutes "just cause" for termination under the collective bargaining agreement in place between the Company and the Union. The undisputed evidence shows that the Company's decision to discipline and terminate Burgos had nothing whatsoever to do with any alleged protected activity, union activity and/or to discourage employees from participating in those activities.

Simply put, the evidence does not support the allegations against the Company and the Complaint, therefore, should be dismissed in its entirety.

FACTUAL BACKGROUND

I. BRIEF SUMMARY OF RELEVANT FACTS

The relevant facts in this case are straightforward and largely undisputed. MV Transportation provides transportation services to clients throughout the country, including in Phoenix, Arizona. In Phoenix, the Company provides ADA compliant transportation services to elderly and disabled customers under a contract with the city of Phoenix. [Tr. pp. 14-15.]

The Amalgamated Transit Union Local 1433 (the "Union") represents a group of employees at the Phoenix facility that includes: "all bus drivers, dial-a-ride drivers and communications employees (window dispatchers, dispatchers and reservationists), employed by the Company at its facility located at 1001 South 4th Street, Phoenix, Arizona." The Company and the Union have an established collective bargaining relationship and have negotiated several collective bargaining agreements.

Burgos has been employed as a bus driver at the Phoenix facility since June 2007. [Tr. p. 34.] As a bus driver, Burgos is covered by the collective bargaining agreement between MV

Transportation and the Union and the Union is her exclusive legal bargaining representative with respect to the terms and conditions of her employment.

Between January 2014 and August 2014, Burgos wrote six (6) letters to the Company detailing issues and complaints that she had regarding her co-workers and issues in the workplace. [G.C. Exs. 3-7 and 9.]² According to Burgos, she sent copies of those letters to the Union and the NAACP. [Tr. pp. 36, 40-41, 44-45, 46-47, 49-50, 54-55.] Burgos testified that she sent the letters to the Company because, among other things, she was being discriminated against because of her race. [Id.] Burgos also testified that all of the issues that she raised in her letters were personal to her and that she did not raise any issues on behalf of any other employee in those letters. [Tr. pp. 97, 103-104, 110, 112-113.] Also, Burgos admitted that the Company did not take any adverse employment action against her because of the issues she raised in her letters. [Tr. 94-95, 103-114.]

On or about April 11, 2014, Burgos filed a charge of discrimination with the Arizona Civil Rights Division (“ACRD”) claiming that the Company had discriminated against her because of her race. [Tr. pp. 118-119; G.C. Ex. 10.] The Company responded to Burgos’ charge of discrimination and denied all the allegations raised in the charge. The ACRD subsequently dismissed Burgos’ charge of discrimination in its entirety with no finding of cause against the Company. [Tr. p. 135.]

On or about August 7, 2014, Burgos filed a second charge of discrimination against the Company with the ACRD. [Tr. p. 136; G.C. Ex. 25.] In that Charge, Burgos alleged that the Company had retaliated against her for filing her previous charge. The Company responded to Burgos’ second charge and denied that it had discriminated and/or retaliated against Burgos in any way. As before, the ACRD dismissed Burgos’ second charge of discrimination against the Company in its entirety. [Tr. pp. 135-136.] Burgos testified that the Company did not “formally”

² Burgos’ letters are dated January 6 [G.C. Ex. 3.], January 11 [G.C. Ex. 4.], May 21 [G.C. Ex. 6.], June 12 [G.C. Ex. 7.] August 11 [G.C. Ex. 5.], and August 7 [G.C. Ex. 9.]

discipline her or take any adverse employment action against her for filing charges with the ACRD. [Tr. p. 136.]

On November 10, 2014, the Company issued Burgos a notice of alleged infraction for violating the Company's cell phone policy. [G.C. Ex. 29; Tr. pp. 211.] That policy prohibits the use of electronic devices by drivers while they are operating their vehicles. The policy also provides for a three day suspension for the first violation of the policy and discharge for a second violation. [R. Ex. 2, p. 3.] That same day, the Union filed a grievance contesting the notice of infraction the Company issued to Burgos. [G.C. Ex. 11.] Ms. Heath subsequently met with Union Representative Dwyane Sessions and Burgos to discuss the Union's grievance. As a result of that meeting, the Company and the Union agreed to resolve the Grievance by reducing for Burgos from a three (3) day suspension under the Cell Policy to a verbal warning. [Tr. pp. 244-245].

On the morning of December 30, 2014, Safety Manager Victoria Hensley instructed Window Dispatcher Daniel Garcia to instruct Burgos (and several other drivers) to come to her office when they reported for duty. This process is standard practice for all drivers who need to be notified to see Ms. Hensley or another member of management. Neither the window dispatcher nor the driver are notified of the reason for the meeting request. Ms. Hensley routinely meets with drivers to review video footage from the DriveCam system. In fact, Ms. Hensley met with approximately twelve (12) other drivers on December 30, 2014, to review DriveCam footage. [R. Ex. 12.]

Rather than report to Ms. Hensley's office to review the DriveCam footage, Burgos went to the yard and performed a pre-trip inspection on her assigned vehicle and left the yard to begin her route. A few minutes later, at 12:12 p.m., radio dispatcher, Brena Ming, radioed Burgos and told her that she need to report back and see Ms. Hensley. Burgos responded "10-4." At 12:41 p.m., Ms. Ming radioed Burgos again and told Burgos that she needed to return to the yard to meet with Ms. Hensley. Burgos responded "copy." A few minutes later, Ms. Burgos radioed dispatch and stated "Yes, could you please let Victoria know she needs to contact the NAACP to have an

appointment with me.” Burgos then returned to the yard, turned in her keys, and told the window dispatcher that she was going home on FMLA. On December 31, 2014, Burgos returned to the facility. At that time, Ms. Heath issued Burgos a notice of infraction and notified that she was being placed on administrative leave until a Fair and Impartial Hearing was conducted on January 2, 2015.

On January 2, 2105, the Company conducted a Fair and Impartial hearing regarding Burgos’ refusal to meet with Ms. Hinsley on December 30, 2014. Mr. Sessions from the Union was present at the hearing along with Burgos. Ms. Heath and General Manager Clark Hart were present from the Company. Fair and Impartial hearings are intended to provide an employee who is subject to potential discipline with the opportunity to explain why discipline should not be imposed. Ms. Heath testified that Burgos refused to provide any explanation as to why she refused a direct order to meet with Ms. Hinsley. [Tr. p. 231.] Ms. Heath explained that since Burgos failed to provide any additional information or explanation regarding the incident that the Company moved forward and terminated Burgos’ employment.

On January 5, 2015, the Union filed a grievance contesting Burgos’ termination. The grievance was not resolved in the grievance process and an arbitration hearing was ultimately set for hearing. On the day of the hearing, the parties reached a settlement on the Union’s agreement. Under the settlement, the Union agreed to withdraw the Grievance in exchange for the Company returning Burgos to work pursuant to a 12-month last change agreement. Burgos returned to in July 2015. Since her return approximately three (3) years ago, Burgos has not been subject to any disciplinary action. [Tr. pp. 137-141.]

II. ANALYSIS

A. Credibility and Adverse Inferences

A credibility determination may rely on a variety of factors, including the context of the witness’ testimony, the witness’ demeanor, the weight of the respective evidence, established or

admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx, 516 (D.C. Cir. 2003). “Credibility findings need not be all-or nothing propositions—indeed, nothing is more common in all of kinds of judicial decisions than to believe some, but not all, of a witness’ testimony.” *Kingman Hospital, Inc.*, 363 NLRB 145 (2016) (citing *Shen Automotive Dealership Group*, 321 NLRB at 622.).

In this case, the testimonies of the Company’s witnesses (Heidi Heath, Kenny Ming, Victoria Hensley, and Brena Ming) are particularly credible and reliable because each provided testimony that was neither embellished nor exaggerated, and each provided foundational and other details that undercut any potential claim of guile, deceit, or exaggeration. Moreover, Ms. Heath, Mr. Ming, Ms. Hensley and Ms. Ming, who were called pursuant to Federal Rule of Evidence 611(c), were highly credible, open, thoughtful and precise. Thus, the testimony from each of them should be fully credited as true and reliable evidence, particularly when in conflict with the General Counsel witnesses’ testimony.

Burgos’ testimony should not be credited, particularly when it conflicts with testimony by Ms. Heath, Mr. Chang, Ms. Hensley, and/or Ms. Chang because her testimony was argumentative, self-serving, and heavily directed by the Counsel for the General Counsel (“CGC”) on direct examination. Additionally, on several occasions there were long pauses in Burgos’ testimony as she struggled to provide coherent answers to straight forward questions about key issues—including why she refused to follow a direct instruction to meet with Ms. Hensley on December 30, 2014.

An adverse inference should be drawn against the General Counsel. The CGC failed to call several witnesses who, if Burgos’ testimony is to be credited, would be predisposed to testify favorably on behalf of the General Counsel’s theory of the case.

An adverse inference does not shift the burden of proof, nor does such an inference generally establish, but itself, the fact at issue, but where a party “presents evidence which, if accepted, establishes a material fact, the failure of an [opposing party] to produce evidence, including testimony, in its possession or control with respect to the existence or non-existence of the fact, is a relevant consideration in determining whether to find the fact.” *Fred Stark*, 213 NLRB 209, 214 (1974), *enfd.* 525 F.2d 422 (2nd Cir. 1975). Furthermore, when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. In particular, it may be inferred that the witness, if called, would have testified adversely to the party on that issue. *International Automated Machines*, 285 NLRB 1122, 1123 (1987), *enfd.* 861 F.2d 720 (6th Cir. 1988).

Burgos testified at that the hearing that she refused a direct order to meet with Ms. Hensley on December 30, 2014, to review a DriveCam video clip (which ultimately resulted in her discharge) because an intake officer by the name of Mr. Scott (and other unidentified people) at the ACRD told her not to speak with any one at the Company who she claimed in her charge of discrimination had discriminated against her. [Tr. pp. 117-120.] Such a fact, if established, would obviously be material to the General Counsel’s case. However, neither Mr. Scott nor anyone else from the ACRD were called by the CGC or Burgos to testify at the hearing. Additionally, the CGC made no showing of any bona fide attempt or impediment to calling Mr. Scott (or any other ACRD employee) to testify. Accordingly, drawing an adverse inference regarding any factual question on which Mr. Scott (or other ACRD employees whom Burgos claims told her not to meet with members of the Company’s management team) is likely to have knowledge is appropriate. See *International Automated Machs., Inc.*, 285 N.L.R.B. 1122, 1123 (1987), *enforced*, 861 F.2d 720 (6th Cir.1988) (explaining that the Board allows an adverse inference to be drawn regarding any factual question to which a witness is likely to have knowledge when a party fails to call that witness if he “may reasonably be assumed to be favorably disposed to the party”).

The General Counsel alleges in the Complaint³ and Burgos testified at the hearing that she discussed her concerns about discrimination in the workplace with several of her co-workers. However, those co-workers were not called to testify at the hearing. Accordingly, an adverse inference regarding whether Burgos had any such conversations with her co-workers should be drawn against the General Counsel. *Id.*

B. Legal Standards

There is no direct evidence in this case that MV Transportation took any action against Burgos because she engaged in protected concerted activity. Accordingly, the General Counsel can only prevail on his Section 8(a)(1) allegations of discriminatory discipline by creating an inference of illegal motive under the *Wright Line* test. *Wright Line*, 251 NLRB 1083 (1980).

Under the *Wright Line* analysis the General Counsel must first make a *prima facie* case by showing that “animus toward [the employee’s] protected activity was a motivating factor in [an adverse employment] decision” based on the following three factors:

- (1) The affected employee engaged in protected activity;
- (2) The employer knew of the activity; and
- (3) The employer bore animus to the affected employee’s protected activity.

Praxair Dist., Inc., 357 NLRB No. 91, slip op. at *1 n.2 (Sept. 21, 2011).

If the General Counsel establishes a *prima facie* case, the employer must then prove that a “legitimate business reason” motivated the action or otherwise demonstrate that the same action would have occurred even in the absence of the protected conduct. *Id.* at 1088; *see also Palms Hotel & Casino*, 344 NLRB 1363, 1363 (2005) (written warning to union supporter was lawful because employer proved that it would have issued warning even in the absence of union activity). If the employer makes that showing, the burden shifts back to the CGC to “show that Respondent’s defense is pretextual.” *Jordan Marsh Stores Corp.*, 317 NLRB 460, 476 (1995).

³ Complaint ¶ 5(a).

**1. Discussion of Concerted Activity Under the *Wright Line* Test—
Complaint Paragraph 5(a)**

To be protected under Section 7 of the Act, employee conduct must be both “concerted” and engaged in for the purpose of “mutual aid or protection.” *Fresh & Easy Neighborhood Market*, 361 NLRB at slip op. 3. Although these elements are closely related, they are analytically distinct.

As noted above, a respondent violates Section 8(a)(1) if, having knowledge of an employee’s protected, concerted activity, it takes adverse employment action motivated by the employee’s protected concerted activity. *Lou’s Transport*, 361 NLRB No. 158, slip op. at 2 (2014). Although Section 7 does not specifically define concerted activity, the legislative history of Section 7 reveals that Congress considered the concept in terms of “individuals united in terms of a common goal.” *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984). The question of whether an employee has engaged in concerted activity is a factual one based upon the totality of the circumstances. *National Specialties Installations*, 344 NLRB 191, 196 (2005).

In *Fresh & Easy Neighborhood Market*, the Board explained that whether an employee’s activity is concerted depends on the manner in which the employee’s actions may be linked to those of his co-workers. 361 NLRB No. 12, slip op. at 3. The analysis focuses on whether there is a link between the activity and matters concerning the workplace or employees’ interests as employees. *Id.* at 4. Generally speaking, a conversation constitutes concerted activity when engaged in with the object of initiating or inducing or preparing for group action or when it has some relation to group action in the interest of employees. *Food Services of America*, *supra* at slip op. 3 (citations omitted).

In this case, the General Counsel failed to establish that Burgos’ alleged conversations with co-workers and/or “complaints” to the Company as alleged in Paragraph 5(a) of the Complaint were engaged in with the object of initiating or inducing or preparing for group action. The General Counsel did not present any evidence that Burgos approached her co-workers to seek their support of her efforts regarding her complaints to the Company about alleged discrimination. In

fact, there is no evidence that Burgos' co-workers were aware that she was raising any complaints with the Company.

Furthermore, Burgos' complaints to the Company described in Paragraph 5(a) of the Complaint were not undertaken for employees' mutual aid or protection. Burgos' herself testified, the complaints she made to the Company dealt with issues personal to her and that she did not raise any issues behalf of anyone else with the Company. As such, the General Counsel has failed to establish Burgos engaged in concerted activity when she submitted her written complaints to the Company. See *City Disposal*, 465 U.S. at 833 n. 10, 104 S.Ct. at 1512 n. 10. (finding that personal, albeit work-related, complaints by an individual employee do not constitute protected Section 7 activity.)

Based upon the totality of the circumstances, there is simply no evidence that Burgos was seeking any other employee's assistance to help her address any issue or complaint about the workplace or that she was seeking to improve the terms and conditions of anyone else's employment. See e.g., *Eastex, Inc. v. NLRB*, 437 U.S. 536, 565 (1978) (The concept of "mutual aid or protection" focuses on the goal of concerted activity; chiefly, whether the employee or employees involved are seeking to "improve terms and conditions of employment or otherwise improve their lots as employees."). Instead, the evidence shows that, at best, Burgos raised personal gripes unique to her situation. As the Board has repeatedly held, however, an individual employee who expresses personal concerns – as Burgos did here – does not engage in concerted activity for "mutual aid or protection." See, e.g., *Meyers II*, 281 NLRB at 887. Burgos' own testimony precludes the General Counsel from meeting the first element of the *Wright Line* test, as it demonstrates that she never engaged in concerted activity for mutual aid or benefit as alleged in Paragraph 5(a) of the Complaint and those allegations must be dismissed as a matter of law.

2. Concerted Activity Under the Board’s *Interboro* Doctrine— Paragraphs 5(c) and (d)

The General Counsel’s claims that Burgos’ conduct described in Paragraphs 5(c) and (d) of the Complaint is concerted activity under the Board’s *Interboro* doctrine is without merit. In *NLRB v. City Disposal Systems Inc.*, the Supreme Court approved the Board’s *Interboro* doctrine, under which the assertion by an individual employee of a right grounded in a collective-bargaining agreement is concerted activity protected by Section 7 of the Act. 465 U.S. 822, 832-834. Under the doctrine, an employee who honestly and reasonably believes that an employer is acting contrary to the employee’s collectively bargained rights is entitled to complain to the employer about such action. The employee’s conduct is protected unless the manner in which the employee made the complaint was too far out of line. *City Disposal Systems*, 465 U.S. 822 (1984); *Brunswick Food & Drug*, 284 NLRB 661 (1987).

The General Counsel appears to assert that three events concerning Burgos involve protected concerted activity by Burgos under the Board’s *Interboro* doctrine: (1) Burgos’ submission of written complaints to the Company about alleged race discrimination in the workplace between December 2013 and August 11, 2014 [Cmplt. ¶ 5(c)]; (2) the Union’s filing of a grievance on November 11, 2014, contesting discipline the Company gave Burgos for violating the Company’s Cell Phone Policy [Cmplt. ¶ 5(d)]; and (3) Burgos participation in a Fair and Impartial Hearing on January 2, 2015, to address her refusal to meet with Ms. Hensley on December 30, 2014. [Cmplt. ¶ 5(c)] Notably, and as discussed in more detail below, the General Counsel does not allege that Burgos’ refusal to meet with Ms. Hensley on December 30, 2014, was protected concerted activity under the *Interboro* doctrine or the *Wright Line* test. Additionally, the General Counsel does not allege that the grievance filed by the Union on January 5, 2015, contesting Burgos’ discharge involved protected activity by Burgos.

Turning first to Burgos’ participation in the January 2, 2015, Fair and Impartial hearing, the facts show that Burgos was not seeking to enforce any contractual right—including the “right not to be subjected to race discrimination and the right to be treated with dignity and respect” as

alleged in Paragraph 5(c) of the Complaint. The evidence shows that the Company scheduled the hearing in accordance with the terms of its CBA with the Union.⁴ Burgos did not request that the hearing be set to assert any contractual right or to discuss any issue. In fact, Ms. Heath testified that other than being present Burgos did not participate in the hearing at all—including providing any explanation as to why she refused to follow the order to meet with Ms. Hensley and/or issues related to any alleged violations of the CBA. There is no authority that suggests that the *Interboro* doctrine applies to such a situation.

Next, the Union's November 11, 2015, Grievance challenging the Company's discipline of Burgos for violating the Company's cell phone policy is not protected activity on the part of Burgos under the Board's *Interboro* doctrine. Under the narrow scope of the *Interboro* doctrine, an assertion by an individual employee of a right grounded in a collective-bargaining agreement may constitute concerted activity protected by Section 7 of the Act. However, the November 11, 2015, Grievance disputing the discipline issued to Burgos for her violation of the Company's policy was asserted by the Union, not Burgos. Article 9, Section 1 of the CBA defines a "Grievance" as "any controversy between the Company and the Union involving a dispute that arises over the application or interpretation of this Agreement or the suspension or discharge of any non-probationary employee the Union and the Company agree that the procedure outlined below shall be utilized for such disputes." [G.C. Ex. 18.] (emphasis added). Article 9, Section 3 provides further that "the Union shall submit the grievance in writing to the Operations Manager, or his designee." [G.C. Ex. 18.] (emphasis added).

There is no authority that provides that a union's assertion through the grievance process that an employer has violated a right or provision of a collective bargaining agreement constitutes concerted activity by a particular employee under the *Interboro* doctrine. Cases applying the *Interboro* doctrine involve situations where an individual employee raises an honest and reasonable complaint regarding perceived violations of collectively bargained rights directly with

⁴ See G.C. Ex. 14, Article 14 "Discipline."

his or her employer. Unlike those cases, Burgos herself did not assert that the Company had violated any provision of the CBA when it issued her discipline for violating the cell phone policy. Extending the *Interboro* doctrine to cover cases where the Union asserts a violation of the CBA through the grievance would expand the doctrine past its breaking point.

Finally, application of the *Interboro* doctrine to the letter complaints that Burgos sent to the Company between December 2013 and August 2014 is not appropriate. As an initial matter, there is no evidence that Burgos was attempting to assert any right grounded in the CBA when she raised those issues with the Company. Burgos did not mention or refer to the CBA in her letters, much less identify any specific right she was seeking to enforce. Indeed, Burgos testified at the hearing that she was not very familiar with the CBA and that she was raising issues personal to her in her letters to the Company.

3. Burgos' Insubordination on December 30, 2014, was not protected concerted activity

As noted above, the General Counsel did not allege that Burgos' refusal to meet with Ms. Hensley on December 30, 2014, to review DriveCam footage was protected concerted activity under the Act. Even assuming that is an issue properly before the court, such an argument is without merit. Nothing in Burgos' behavior and statements on December 30, 2014, could remotely be viewed as attempting to enforce any provision of the CBA. She was instructed several times that she needed to meet with Ms. Hensley—something that she had done numerous of times during her employment.

Burgos testified that she refused to meet with Ms. Hensley because someone at the ACRD told her not to meet with anyone she claimed had in her charge of discrimination to that agency had allegedly discriminated against her. However, Burgos did not provide any documentation that the ACRD gave her any such instruction and (as discussed above) the General Counsel did not call anyone from the ACRD to testify to verify Burgos' claim. Thus, there is no evidence that Burgos had an honest and reasonable belief that she did not have to meet with Ms. Hensley.

Moreover, Burgos demand that the Company schedule a meeting with the NAACP to meet with her to review DriveCam footage amounted to attempt to change the collective bargaining agreement. The collective bargaining agreement specifically provides that the Union is the legal bargaining representative of employees in the bargaining unit, including Burgos. In addition, Union representative Dwayne Sessions' testified at the hearing that the Company could not meet and bargain with the NAACP (or any other third party) regarding Burgos' terms and conditions of employment. As such, Burgos' refusal to meet with Ms. Hensley unless she scheduled a meeting with the NAACP was not protected. *See Newark Morning Ledger*, 316 NLRB 1268, 1271 (1995), (holding that an employee's conduct was not protected because it amounted to an attempt to change a term of the collective-bargaining agreement and a longstanding past practice.)

C. The General Counsel Has No Evidence To Establish The Third Element Of The *Wright Line* Test Because There Is Evidence That The Company Held Any Animus Towards The Conduct Alleged To Be Protected Activity.

There is no evidence that MV Transportation exhibited animus toward any protected concerted activities that Burgos allegedly engaged in. At the hearing, the CGC appeared to argue that animus in this case was established by: (1) the Company's decision to reduce a potential three (3) day suspension for Burgos for her violation of the cell phone policy to a verbal written warning; and (2) the timing between Burgos' alleged protected activity and her termination.

Any claim by the General Counsel that the Company's decision reduce a potential three (3) day suspension of Burgos to a verbal written warning is absurd. Ms. Heath testified that she agreed to reduce the potential suspension of Burgos to a verbal written warning during discussions with the Union as part of the grievance process. Ms. Heath explained that there was some disagreement between the Company and the Union regarding the cell phone policy and that the Company agreed to reduce the discipline for Burgos as part of "labor peace" with the Union. It simply cannot be said, as the CGC asserted at the hearing, that the Company's agreement with the Union to further labor peace is tantamount to animus.

Any argument by the General Counsel that animus in this case is established by the timing between Burgos' alleged protected and/or union activity should be rejected. In *Qualitex, Inc.*, 237 NLRB 1341, 1343-1344 (1978), the Board explained that there are times when it will not presume antiunion animus from the timing of an employee discharge. In that case, the employer discharged an employee with significant union activity approximately four (4) to five (5) months after a union election where the employer had vigorously opposed the unionization of its employees. Relying on the passage of time between the union activity and the adverse employment action, the Board declined to find discriminatory intent or sufficient antiunion motive. Similarly, in other cases the Board found that the passage of time to be sufficient to either negate the proof or inference of a nexus between the protected conduct and any animus that the evidence might suggest. *See Central Valley Meat Co.*, 346 NLRB 1078, 1079 (2006) (adverse action which occurred over 6 months after employee's union activity was too remote in time to constitute a causal connection); *Chrysler Credit Corp.*, 241 NLRB 1079 (1979) (concerted letter writing campaign occurring 8 months prior to discharge and deficiencies in performance were well documented by supervisor).

Here, most of the protected and/or activity that the General Counsel alleges Burgos engaged in occurred over six (6) months or more prior to her termination. As discussed above, the Board has routinely held that such a long period of time between protected activity and an adverse employment action is simply too remote in time to establish animus on part of the employment.

Moreover, it is well established that the timing of a discharge is only one factor and that a discharge may be held lawful if other factors indicate that it was properly motivated. *See e.g. Be-Lo Stores v. NLRB*, 126 F.3d 268, (4th Cir. 1997). Here, the evidence shows that the Company's decision to terminate Burgos was properly motivated. The facts show that the Company conducted a complete and fair investigation into the matter, including conducting a hearing to provide Burgos with an opportunity to fully explain why she refused to meet with Ms. Hensley as instructed. Burgos, however, refused to provide any explanation during that hearing as to why she refused to meet with Ms. Hensley. The facts also show that the collective bargaining agreement between the

Company and the Union specifically provides that insubordination constitutes “just cause” for termination. Further, the evidence shows that the Company did not take any adverse employment action against Burgos when she had raised issues with the Company previously and when she filed complaints with the ACRD. In fact, the evidence shows that approximately one (1) month before her termination, the Company agreed to reduce a potential three (3) day suspension as a result of Burgos’ violating the Company’s cell phone policy to a verbal warning.

Simply stated, the overwhelming evidence presented at the hearing established that the Company did not hold any animus towards Burgos’ protected and/or union activity.

D. Even If The General Counsel Had Established A *Prima Facie* Case Under *Wright Line*, MV Transportation Has Proven That Its Actions Toward Burgos Were Motivated By Legitimate Non-Pretextual Business Reasons.⁵

Even if the General Counsel could establish a prima facie case under *Wright Line*, MV Transportation has articulated legitimate and non-pretextual reasons for terminating Burgos employment. As discussed in detail above, the Company discharged Burgos’ employment because she refused a direct order to meet with Ms. Hensley. The evidence shows that Burgos and other employees regularly met with Ms. Hensley to discuss safety related issues. Rather than meet with Ms. Hensley, Burgos demanded that the Company contact the NAACP to schedule a meeting with her. Burgos’ actions were clearly insubordinate and constituted just cause for immediate termination under the Company’s collective bargaining agreement with the Company.

CONCLUSION

For the foregoing reasons (and based upon all the evidence and testimony presented at the hearing), the General Counsel failed to prove that any of the allegations in the Complaint by a preponderance of the evidence. Accordingly, the Complaint should be dismissed in its entirety.

⁵ For the reasons contained herein, the Company also contends that the General Counsel also failed to establish that the Company took any action against Burgos to discourage employees from engaging in protected and/or union activities or because or because Burgos joined or engaged in Union activities as alleged in the Complaint.

DATED this 12th day of April 2018.

OGLETREE DEAKINS NASH SMOAK &
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CERTIFICATE OF SERVICE

I hereby certify that this document was filed and served on this 12th day of April 2018, as follows:

Via E-Filing:

The Honorable Charles J. Muhl
Administrative Law Judge
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